No. 20219

IN THE

United States Court of Appeals For the Ninth Circuit

PALMBERG CONSTRUCTION CO.,
an Oregon corporation,
Appellee-Appellant,

v.

SIMPSON TIMBER COMPANY,
a Washington corporation,
Appellant-Appellee,

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BLAIR, THOMAS, O'HERN & DAHEIM
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CLINTON HULL PRINTING COMPANY — TACOMA

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SUBJECT INDEX

TABLE OF CASES

TABLE OF CASES (Continued)

RULES AND TEXTBOOKS

STATUTES

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CONSOLIDATED BRIEF OF Palmberg Construction Co. as APPELLANT and as APPELLEE

JURISDICTION

Jurisdiction has already been outlined in Simpson's brief. Palmberg appeals (TR. 259 (*) from the judgment and from order (TR. 255) denying Palmberg's motion (TR. 241) for judgment for interest.

CONCISE STATEMENT OF THE CASE

Both the partially prevailing plaintiff, Palmberg Construction Co., and the defendant, Simpson Timber Company, have appealed. It was stipulated that Simpson should first file its appellant brief and that Palmberg should then file a consolidated brief, incorporating its argument on its appeal and its answer to Simpson's argument on Simpson's appeal. Because each party is both an appellant and an appellee, in this brief plaintiff below will be referred to as "Palmberg" and the defendant below will be referred to as "Simpson".

This case arises on the claim (TR. 1) of Palmberg, a dredging contractor, for the balance due for work performed for Simpson. The work consisted of filling of certain of Simpson's land by means of hydraulic dredging of materials from the adjacent harbor areas. The primary question involved is one of fact, the amount to which Palmberg was entitled for its work. Palmberg claimed that for the work it performed it was entitled to approximately $274,000.00, that the defendant had paid only approximately $190,000.00, that the defendant had stated that it would pay an additional $16,187.00, but only in the event plaintiff would agree to waive its claim for additional compensation, and that

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FOOTNOTE:

* Throughout this brief references to the Transcript of Record are designated "TR." followed by the page number; references to the Reporter's Transcript of Proceedings are designated "R." followed by the page number; exhibits are designated "Ex." followed by the exhibit number.

defendant was still indebted in the sum of approximately $84,000.00. By its answer (TR. 5) defendant admitted that it still owed plaintiff $16,187.00, but set up a counter-claim against plaintiff and claimed the right of offset.

The jury awarded plaintiff a verdict of only $34,508.51 (TR. 244) and found against defendant on its counter-claim (TR. 43).

The principal question involved on Palmberg's appeal is its claim for interest on the previously liquidated portion of its recovery ($16,187.00), which portion Simpson had refused to pay unless Palmberg would agree to give up its claim for additional compensation. It was agreed that the Court should determine this question and the jury was so instructed (Instruction No. 32, R. Vol. VI, 38). After verdict, Palmberg moved for supplemental judgment for this interest (TR. 241). The Court's denial of that motion (TR. 255), to which Palmberg has assigned error, raises that issue before this Court.

The second question involved on Palmberg's appeal is the propriety of a preliminary order entered by the Pretrial Judge (TR. 134), which limited plaintiff's proof and made certain conclusions as to one reference contained in the written contract. This issue is brought before this Court by Palmberg having assigned error to the entry of that order.

The third question involved in Palmberg's appeal is the failure of the Trial Court to instruct the jury that

the written contract contained no specified completion date (plaintiff's proposed Instruction 42, TR. 242). Palmberg excepted to the Court's failure to give this instruction (R. Vol. VI, 62) and assigns error thereto.

Simpson's appeal is based upon alleged error assigned by it to certain of the Court's instructions, Simpson's objections to some of the evidence, and refusal of the Trial Court to direct verdict in its favor, and that the jury's verdict denying its counter-claim was "against the weight of the evidence."

The contract (Ex. A-1) provided that the dredger should be paid on the basis of his monthly estimate of the amounts of materials being dredged into the fill, and that Simpson should furnish the contractor surveys and cross sections of the area filled, both before and after dredging, so that the pay quantities could be accurately determined. There was testimony that Palmberg based its bid (R. 366, 367) and estimated its progress (R. 353) on the information contained upon the map or diagram (Ex. 2) previously furnished it. The information had been put on this map by Simpson's engineers after several months of preliminary work during which they investigiated the conditions, took soundings and measurements of the amount and location of the work Simpson wished to have performed (R. 128-131). This map outlined the scope, location, extent and details of the job and it had been prepared to explain and illustrate the scope of the work to prospective bidders (R. 131).

After several months Simpson made a survey of the partially completed fill and found that Palmberg had been over-estimating the amount of materials which had been dredged. When Palmberg was given this information, it then investigated the reason for the discrepancy and discovered that part of the information on the map which Simpson had given it, and upon which it had based its bid and had been estimating its rate of production and progress was incorrect. Palmberg promptly advised Simpson of this and advised Simpson that the work would prove more costly and time consuming, particularly because the areas from which the additional material would have to be obtained were farther away than the primary area and were more costly and difficult to dredge than the area originally agreed upon, and that much of them included excessive amounts of trash and other foreign materials and were full of obstacles. Palmberg voluntarily agreed that it would withhold any further billings for materials dredged until completion of the work. By this letter (Ex. 25) Palmberg pointed out that its costs would exceed its income and that it wished to discuss reimbursement of some of those excess costs. The record shows that Palmberg then completed the dredging, during which time it furnished Simpson its cost records, but did not thereafter bill or receive payment for materials dredged at the contractual rate. The record includes no evidence that Simpson disagreed with Palmberg's position until some months after the contract was completed.

Simpson then refused to pay any additional compensation but did admit its indebtedness of $16,187.00. This was based strictly upon the originally agreed upon contractual rate for the amount of material that Simpson claimed was then present in the completed fill. However, Simpson failed to furnish surveys or cross sections of the completed fill to substantiate that amount. From the evidence the jury was entitled to find that the actual yardages dredged were substantially more than the amount for which Simpson was willing to pay.

SPECIFICATION OF ERRORS

Assignment of Error No. 1:

The Court erred in entering its order (TR. 255) denying Palmberg's motion (TR. 241) for supplemental judgment or in the alternative amended judgment, and in directing entry of judgment in only the sum of $34,508.51 without adding thereto interest on that portion of the verdict ($16,187.00) which Simpson had previously admitted to be due.

Assignment of Error No. 2:

The Court erred in entering its order (TR. 134), denominated as an order granting in part defendant's motion for summary judgment.

Assignment of Error No. 3:

The Court erred in failing to give plaintiff's proposed Instruction No. 42 (TR. 242) which read as follows:

> "You are instructed that the Court has determined as a matter of law that the written agreements between the parties did not require the Plaintiff to complete the dredging and filling by June 1, 1960, or within any specified period."

At trial, Palmberg excepted (R. Vol. VI, 62) on the ground that construction of the portion of the contract dealing with any completion date was for the court and that the jury should have been instructed that the written contract did not bind Palmberg to complete performance by any specified completion date.

SUMMARY OF ARGUMENT ON PALMBERG'S ASSIGNMENTS OF ERROR

Assignment No. 1 is directed to the failure of the Court to allow interest on the sum of $16,187.00. This was the amount which Simpson had computed as being admittedly due Palmberg at the agreed upon contractual rate. Palmberg, after completion of the work, claimed it was entitled to additional compensation. Simpson rejected that claim for additional compensation in its entirety. Simpson admitted that it owed Palmberg this sum of $16,187.30, but refused to pay it unless Palmberg would agree to accept it as final payment and waive his claim for additional compensation. Thus Simpson wrongfully retained the use of this amount and deprived Palmberg of it for several years.

Even in its answer to this suit Simpson admitted that this sum was due and in its answer gave as supposed justification for its failure to pay only its alleged coun-

ter-claim against Palmberg. This counter-claim sought damages for delay in completion of the work beyond the supposed completion date of June 1, 1960, and for damages allegedly arising through negligent operation of the dredge. The Court withdrew from the jury the issue of any alleged negligent damage and the jury found against Simpson on its counter-claim for delay (TR. 243). The verdict included this sum of $16,-187.00 plus an additional $18,321.51 (of which $704.67 was sales tax, leaving a net recovery of only $17,616.84), a total of $34,508.51. Palmberg believes the Trial Court was clearly in error in refusing to allow it interest on this $16,187.00, no part of which was in issue in this case.

Palmberg's second assignment of error is directed to the entry of the order by the Pretrial Judge, which was denominated an "order granting in part and denying in part defendant's motion for summary judgment". In this order the Pretrial Judge, based on his assumption as to the meaning of part of the written contract, limited the proof and denied Palmberg an opportunity to present any proof of what it had been told by Simpson with reference to the materials being free from "debris". This order was of course interlocutory and subject to amendment and construction by the Trial Judge and Palmberg had no right to appeal from it until after final judgment. By reason of this order Palmberg was required to limit its proof as to the adverse effect of encountering and being required to dredge excessive amounts of debris to the debris encountered only in those areas from which

it was required to dredge more materials than originally contemplated or agreed.

Palmberg believes the entry of this order was error because the Pretrial Judge, without an opportunity to hear any of the evidence, mistakenly tried to import into the definition of the material to be dredged (sand, gravel and cobbles) the mention in that portion of the contract dealing with setting up a formula for method of payment (definition of an operating hour) of the possibility of encountering *some* "debris". This preliminary order was also in error in ordering that parol evidence would be inadmissible if it tended to vary the provisions of the contract respecting only this one item of "debris". At trial, the other party, Simpson, was permitted over objection to introduce much evidence of prior, contemporaneous and subsequent oral agreements and understandings of the parties dealing with many other matters, including the pumping distances and the supposed agreed time of completion. Although this preliminary order on its face prohibited the introduction only of *statements* or *representations* made prior to or contemporaneously with the contract, which might "vary its terms" respecting "debris", the order nevertheless proved quite prejudicial as Simpson's attorneys continuously attempted to convince the Trial Court that this interlocutory order meant something entirely different. Indeed, at trial, Simpson's attorneys attempted to convince the Trial Court that by reason of this order Palmberg should not even be permitted to prove the

damages it sustained in encountering an excessive amount of obstacles, such as large concrete blocks, buried pilings and salvagable sinker logs in areas outside of and beyond those areas which Palmberg had originally agreed to dredge!

Palmberg's third assignment of error is directed to the failure of the Court to instruct the jury that by the written contract Palmberg had not agreed to complete the dredging by June 1, 1960, or by any specified date. The contract itself clearly shows that Palmberg never agreed to any such condition or requirement.

ARGUMENT ON PALMBERG'S APPEAL

Argument on Palmberg's Assignment of Error No. 1

Palmberg contended that it was unquestionably entitled to recover at least the sum of $16,187.00 which Simpson in its correspondence and in its pleadings had consistently admitted was due, and that regardless of the outcome of the litigation as to its claim to additional compensation, it was entitled to that sum plus interest thereon at the rate of 6% from at least the 12th of October, 1961 (Pretrial Order, TR. 158). It was agreed that the Court, and not the jury, should determine Palmberg's right to interest on that amount and the jury was so instructed (Instruction No. 32, TR. Vol. VI, 38). This was the same procedure followed in the case of *Walla Walla Port District vs. Palmberg*, (CA 9, 1960) 280 F. 2d 237, in which the owner had likewise refused to make payment of that portion of the balance admit-

tedly due the contractor unless the contractor agreed to waive his claim for additional compensation.

By its letter of October 12, 1961 (Ex. 16), Simpson refused to pay any *additional* compensation and computed the balance due at the contractual rate as being the sum of $16,187.00. As shown by that exhibit, this sum was reached by multiplying the yardage which Simpson claimed it had computed as having been dredged by the exact contract rate. That letter concluded,

> ". . . you are requested to submit to this office your final billing in the amount of $16,187.00 representing the balance of our account with you."

Attached to this letter was Simpson's computation which concluded with the language,

> "Total remaining balance $16,187.00."

The full text of that exhibit clearly shows that the offered amount was for yardages admittedly dredged at the contractually agreed rate. It was not in any way an offer of "settlement" of Palmberg's claim for additional compensation. This letter *rejected* that claim in its entirety. Simpson refused to pay even one cent to settle the disputed claim. While admitting it owed the $16,187.00, Simpson wrongfully withheld that amount unless Palmberg would forego its claim in its entirety. Palmberg replied by its letter of October 27, 1961 (Ex. 17), again requesting negotiation to settle the amount of its *extra* compensation to which it was entitled, and concluded,

> "Whether or not this meets with your approval, we would appreciate your remitting to us the $16,187.00 admitted as due and owing to us for work performed subject to our claim for additional amounts due and owing."

By its letter of November 6, 1961 (Ex. 18) Simpson then sent Palmberg its check in the sum of $16,187.00. That letter stated in part,

> "Should it not be acceptable as payment in full, Simpson will wish to off-set its losses sustained by reason of your failure to complete the dredging operation within the time represented by you.
> "We, therefore, enclose our check in the sum of $16,187.00 as payment in full of all obligations of Simpson to you arising out of its Purchase Order No. 52471-PE dated January 12, 1960, as amended by Supplemental Purchase Order dated February 17, 1960. Should it be unacceptable on that basis, we request that it be promptly returned."

By this letter Simpson attempted the identical maneuver by which the Port District in the case of *Walla Walla Port District vs. Palmberg*, 280 F. 2d, 237, supra, also tried to prevent the contractor from recovering the additional compensation to which it was clearly entitled. By its letter of November 8, 1961 (Ex. 19), Palmberg returned that check stating that it was unacceptable on Simpson's terms and pointed out that the withholding of this amount was completely unjustified and that interest thereon would be claimed.

By its answer in this suit Simpson stated,

> "There remains owing to the plaintiff the amount of $16,187.00 only, which amount the defendant has tendered to the plaintiff." (TR. 7).

Indeed, even the prayer of Simpson's answer included a prayer,

> "That the court adjudge that the plaintiff is entitled to the sum of $16,187.00 only as the balance due on the above mentioned contract, which amount has been tendered to the plaintiff by the defendant."

Simpson attempted to justify its failure to pay this amount, admittedly due, only on the basis of an alleged off-set for delay in completion beyond the supposed completion date of June 1, 1960, and for damages allegedly arising through negligent operation of the dredge. The Court withdrew from the jury the issue of any alleged negligent damage, and the jury found against Simpson as to any supposed off-set for delay (TR. 243). The verdict included this sum of $16,187.00 plus an additional $18,321.51 including sales tax, the total verdict being $34,508.51. Actually Palmberg's recovery of additional compensation, exclusive of the sales tax was only $17,616.84 and that is the only amount in issue upon Simpson's appeal. Ever since 1961 Simpson wrongfully withheld payment of the $16,187.00 and had the use of that money during the entire period while Palmberg was deprived of it.

Simpson's only possible justification in withholding this amount was by reason of a claimed off-set which

the jury found groundless. The situation is practically identical with the situation in the case of *Walla Walla Port District vs. Palmberg*, 280 F. 2d 237, supra, excepting only in that case the Port District was not claiming any off-set.

It is well settled that interest is allowable on the liquidated portion of a claim. *Caterpillar Tractor Co. vs. Collins Machinery Co.* (CA 9, 1960) 286 F. 2d 446, 452, in which the Court stated:

> "Under Washington law interest is allowable on all claims that are liquidated or readily ascertainable by mathematical computations or by reference to standards prescribed in the contract—in other words, where it is not necessary to rely upon opinion or discretion."

See also *Puget Sound Pulp & Timber Co. vs. O'Reilly* (CA 9, 1956), 239 F. 2d 607, 612, in which the Court, quoting from one of the cases of the Washington Supreme Court, stated:

> "*Interest on money detained after it is due and payable is recoverable as matter of legal right.*" (Emphasis is that of the Court.)

The Washington statute allowing interest is RCW 19. 52.010. Naturally, interest is not allowable on an unliquidated claim because the person liable does not know what he owes and therefore cannot be in default for not paying. 15 Am. Jur. Damages § 161, p. 579. However, Simpson did know this exact amount of $16,-

187.00 which it knew, and consistently admitted it knew, was always due Palmberg.

The fact that Simpson refused to pay that liquidated amount because of a claimed off-set does not make the claim for that amount unliquidated. This was conclusively determined in the case of *Mall Tool Company vs. Far West Equipment Company*, (1954) 45 Wn. 2d 158, 237 P. 2d 652, in which the Court stated at page 177:

> "An unliquidated counterclaim, even when established, does not affect the right to interest prior to judgment on the amount found to be due on a liquidated or determinable claim, since the debtor may not defeat the creditor's right to interest on such a claim by setting up an unliquidated claim as an off-set."

That case, as well as the subsequent case of *Haynes vs. Columbia Producers, Inc.*, (1959) 54 Wn. 2d 899, 344 P. 2d 1032, held that interest is allowable on either a fully liquidated claim or one, the amount of which can be determined by computation. It is also the law of Washington that it is proper to allow interest on that portion of a claim which is liquidated, even though the claim also includes a claim for damages which are not liquidated. *Lloyd vs. American Can Co.*, (1924) 128 Wash. 298, 222 Pac. 876.

The Trial Court should have entered a supplemental judgment allowing interest on the liquidated portion of Palmberg's claim, as was approved in the *Walla Walla* case.

Argument on Palmberg's Assignment of Error No. 2

Prior to agreement upon and entry of the extended pretrial order (not *following* the entry of this pretrial order, as erroneously stated at page 8 of Simpson's brief), Simpson made and argued a motion which it entitled one for "summary judgment" (TR. 131). This motion moved the Court,

> ". . . to enter summary judgment for the defendant on the issues of the inadmission of parol evidence adding to or varying the terms of the written contract between the parties and construction of that contract."

While the motion stated that it was being made pursuant to the provisions of Rule 56(b) and (c), the motion did not seek and the order did not grant "judgment" on "all or any part" of Palmberg's claim. The order entered was denominated (by counsel) an "order granting in part . . . defendant's motion for summary judgment" (TR. 134). Actually, it constituted the type of order contemplated by Subsection (d) of Rule 56, which is substantially similar to the order made upon a pretrial hearing under Rule 16. The effect and finality of such an order is analyzed and fully discussed at 3 Barron & Holtzoff, Federal Practice, § 1241, pgs. 187-196. The distinction between an actual summary judgment, and the order entered by the Pretrial Judge in the instant case is illustrated in cases such as *King vs. California Company*, (CA 5, 1955) 224 F. 2d 193, 196, and *Coffman vs. Federal Laboratories*, (CA 3, 1948) 171 F. 2d 94, 98. As the Court stated in the latter case,

> "Subsection d simply provides for a method whereby the trial judge with the aid of counsel can point up the controverted issues. It is, moreover, similar to the pretrial procedure provided for in Rule 16 and the matters determined in the issues so framed are not foreclosed in the sense that the judge cannot alter his conclusions . . . THEREFORE, even if we accept the plaintiff's contention as to what was determined by the motion, the court was still free to alter its view as to interpretation of the orders at a later stage of the proceedings. Res judicata was not and is not applicable."

The Trial Judge clearly had the right to interpret, relax or even modify such an order. *Smith Contracting Corp. vs. Trojan Construction Company*, (CA 10, 1951) 192 F. 2d, 234; *Clark vs. Pennsylvania Railroad Company*, (CA 2, 1964) 328 F. 2d, 591.

Despite the fact that the Trial Judge may not have erred in the manner in which he interpreted and applied this pretrial order, the entry of that order was in error and was prejudicial to Palmberg. The problem was that throughout the trial, and throughout its brief, Simpson's attorneys continually attempted and do now attempt to convince this Court that this interlocutory order meant something entirely different than it states.

The Pretrial Judge, not having been afforded the opportunity to hear any of the evidence, mistakenly tried to import into that portion of the contract specifying the nature of the material to be dredged (sand, gravel and cobbles) the mention in that portion of the contract setting up a formula for rate of payment (definition of

an operating hour) of the possibility of encountering *some* debris. The ruling was that the contract, "provides for the possibility of the plaintiff's encountering debris in the dredging operations" (TR. 135). Palmberg believes that the Pretrial Judge clearly misconstrued the contract and the meaning of the reference to the possibility of encountering some debris which was contained, not in the definition of the materials to be dredged, but in the standard dredging definition of an operating hour. It should be pointed out that this was not a straight rental contract by which Palmberg was to be paid a flat rental for each of its operating hours. This standard definition of an operating hour was inserted only as a part of the payment formula. It certainly was not intended to change Palmberg's obligation from one to dredge sand, gravel and cobbles from the closer and cleaner areas originally designated to one to dredge *substantial* quantities of excessive amounts of foreign materials, mixed with and imbedded in the originally contemplated sand and gravel, particularly from areas trashier, farther away and containing many more obstructions than those it originally agreed to dredge!

From the erroneous premise the Pretrial Judge then concluded that the *written* contract contained no warranty with respect to the quantity, not only of trash, but of such obstacles as sinker logs, concrete blocks, buried and submerged piling and other foreign objects encountered. Obviously, the written contract contemplates no

such possibility and itself contained no warranty with respect to the absence or presence of such conditions, which were obviously unknown at the time to *either* of the parties. Palmberg never contended that the written contract contained such a warranty, and this order in effect dealt with and attempted to dispose of a matter not actually ever in issue.

The unfairness and impropriety of the order limiting proof is illustrated by the fact that it provided parol evidence would not be admissible if it tended to vary the provisions of the contract respecting only this one item of "debris". Nevertheless, Simpson was permitted at trial, over objection, to introduce much evidence of prior, contemporaneous and subsequent alleged oral statements and understandings dealing with many *other* parts of the contract, including pumping distances and the supposed agreed rate of progress, mention of both of which was also contained in the written contract.

The proper rule is contained in the case of *Moran Brothers Co. vs. Pacific Coast Casualty Co.*, 48 Wash. 592, 598, 94 Pac. 106:

> "... But it is just as well established that parol testimony is admissible to explain written contracts when there is anything doubtful in the language used, or to supply omissions, or to prove agreements between the parties which were not merged in the contract though they might have relation to the same subject matter. It is the province of the court to determine, both from the written contract and from oral testimony, the intent of the parties in

relation to what was incorporated in the written agreement."

By reason of this order Palmberg at trial was not permitted and did not attempt to introduce its evidence of what it had been told by Simpson as to the nature of the materials in the quantities and amounts in the areas originally designated. Had it been permitted to introduce such proof, it undoubtedly would have recovered a substantially larger verdict. However, the principal prejudice was Palmberg's difficulty at trial in introducing proper evidence. This was caused by the continual attempts of Simpson's attorneys to convince the Trial Court that by reason of its interlocutory order Palmberg should be precluded from showing the conditions and difficulties it encountered by reason of being required to dredge materials in greater amounts from different areas than originally agreed. Indeed, at trial, Simpson's attorneys attempted to convince the Trial Court that by reason of this order Palmberg should not even be permitted to prove the damages it sustained by encountering an excessive amount of obstacles, such as large concrete blocks, buried pilings and salvagable sinker logs outside of and beyond those areas which Palmberg originally had agreed to dredge!

Palmberg submits that in entering this order, which unduly emphasized and misconstrued one isolated provision of the contract, and preliminarily precluded proof by only one party to the contract of the circumstances

of entering into the contract was, at this stage of the case, error.

Argument of Palmberg's Assignment of Error No. 3

Simpson contended that by the written contract Palmberg agreed to complete its work by June 1, 1960 (Pretrial Order, TR. 166). Under the evidence it was clear that by its written contract Palmberg never agreed to complete the work by June 1, 1960 or by any specified date. The Court should have given Palmberg's proposed instruction No. 42 (TR. 242) which would have so instructed the jury.

Palmberg's original proposal (Ex. A-1) was explicit as to the rate of progress. It provided,

> "Dredging shall begin in January, 1960; and shall be carried on twenty four hours per day, five or six days per week."

Dredging did not commence until February, partly because Simpson delayed its acceptance of this proposal (R. 441-442). This offer was accepted on its identical terms, both by the written approval of Simpson thereon and the issuance of its purchase order (Ex. A-3). Subsequently, by a letter of February 5, 1960 (Ex. 9), Palmberg offered to bring another dredge on the job to perform,

> ". . . under the terms and conditions set forth in our letter of December 29, 1959, embodied in the reference purchase order, subject to the following additions; . . ."

Those specific proposed additions to specific numbered paragraphs and sub-paragraphs of the original proposal were fully set out. Neither of them mentioned or implied any specific completion date. Simpson accepted this offer by the issuance of its supplemental purchase order (Ex. 10). This added to the original written contract the identical language and terms of Palmberg's offer. No term or addition with reference to any agreed completion date was added! Simpson's argument that Palmberg had in writing agreed to complete the work by June 1, 1960 is limited solely to the recitation in this supplemental purchase order that Simpson's apparent reason in accepting, in its identical terms, Palmberg's supplemental offer, was,

> ". . . in order to *permit* completing the fill operation by June 1, 1960." (Emphasis supplied)

Simpson's resident engineer admitted that he had given Palmberg permission to remove this second dredge from the job prior to June 1, 1960 (R. 777). He also admitted that he had sufficient experience to draw a contract which would have required Palmberg to complete the work within a particular time, knew that he could have conditioned the agreement upon a requirement of a particular completion date, and that one of the reasons he did not incorporate a binding condition as to completion date in this contract was that he knew such a condition might have resulted in an increase in the contractor's offered price (R. 778-779).

As the written offer and acceptance, properly construed, obviously contained no binding condition or requirement of any specified completion date, the jury should have been so instructed. As pointed out in Simpson's brief, ordinarily construction or legal effect of a contract must be determined by the Court as a question of law. *Bellingham Etc. vs. Bellingham Coal Mines*, 13 Wn. 2d 370, 381; 125 P. 2d 668, 675 (1942).

By this assignment Palmberg is not now claiming as error submission by the Court to the jury of a supposed issue of some *implied* agreement to complete within a reasonable time. Although the jury found against Simpson on this issue, Palmberg feels that it was erroneous and prejudicial to submit to the jury the issue of whether Palmberg had in writing promised and agreed to complete the work by June 1. Evidence and argument permitted on that issue may well have adversely affected the result, as indicated by the extremely small amount of the net recovery which the jury allowed Palmberg.

ARGUMENT IN ANSWER TO SIMPSON'S APPEAL

Simpson's Assignments of Error Nos. 1 and 2

Simpson here complains of a small portion of the Court's introductory instruction which outlined the respective contentions of the parties from the agreed pretrial order. By its succeeding instruction (No. 2, R. Vol. VI, 6), the Court cautioned the jury that its statement of the case was, "merely a summary of the claims, contentions and allegations" of the parties.

Simpson cites no case holding it error to outline to the jury in the preliminary instruction the respective contentions of the parties. The Washington court in a very recent case in which a similar argument was made, *Mulkey vs. Spokane, Portland & Seattle Railway Company*, (1964) 65 Wn. 2d 98, 104, 396 P. 2d 158, in disposing of a similar assignment of error to the Court's statement of the case, stated:

> "We can see no prejudicial error in the trial court's mentioning in the instruction covering the allegations of the partiies in their pleadings, the plaintiff's contention that the defendant was negligent in not maintaining a proper lookout. No specific instruction on 'lookout' was given, and its mention as a contention of the plaintiff's must be read in connection with the statement in the same instruction: That it was merely a summary of the allegations of the parties in their pleadings, and that they (the jury) were not to take the same as any proof of the matters alleged, except as admitted in the pleadings, and were to consider only those matters alleged in the pleadings which had been established by the evidence."

Simpson's first complaint is that mention was made in the preliminary instruction of Palmberg's original contention that the $274,885.00 which it was claiming for the work it performed was the reasonable value of the work. The cases cited by Simpson do not indicate that the "loss of bargain" or the ascertained reasonable value of the work actually performed (See *Woodmont, Inc. vs. Daniels*, (CA 10, 1959) 274 F. 2d 132) would have been an impermissible measure of damages. In *Texas Tunnel-*

ing Company vs. City of Chattanooga, Tenn., (1962) 204 Fed. Supp. 821, a contractor was allowed recovery against an engineering firm which had negligently furnished incorrect information upon which the contractor had based its bid. The proper measure of damages was there found to be the difference between the amount which the plaintiff bid and the amount which it would have bid had it received correct information. In *United States vs. Atlantic Dredging Company*, 253 U.S. 1, 40 S.Ct. 423, 64 L. Ed. 735, the contractor was allowed recovery for the *total amount* expended by it without any regard to the contractual rate. In this regard it is significant that Palmberg contended (Pretrial, TR. 147) and its evidence clearly showed that its actual cost greatly exceeded the amount which it claimed was the reasonable value of its work. Palmberg's original claim was of course stated on several different theories, including one that Simpson impliedly agreed to renegotiate the price. In any event, the Court did not instruct the jury that Palmberg was entitled to the reasonable value of all the work it performed, but gave the jury a clear and proper instruction as to the measure of damages (Instruction No. 37, R. Vol. VI, 42), to which no exception was taken.

Simpson next complains that it was error for the Court to explain in this preliminary instruction Palmberg's contention that the contract did not require it to dredge great amounts of foreign material other than sand, gravel and cobbles. It should first be noted that this sentence refers to many other obstructions other

than "debris" and does not in any way state or infer that the contract did not make reference to the possibility of there being "encountered" some debris. It is not in any way inconsistent with the Pretrial Judge's order or contrary to its meaning or intent. A full reading of the paragraph of the Court's preliminary instruction from which this sentence is taken shows that the jury was clearly instructed that Palmberg was claiming damages, not because of any debris in the original area, but because of obstructions and excessive debris in the added areas, which coupled with the increased pumping distances and the changes made in its work, greatly increased its costs.

However, because this matter of the Pretrial Judge's order is so frequently mentioned in Simpson's brief, Palmberg takes this opportunity to point out what that order actually said. The decreeing portion read:

> "IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the *written* contract which is identified as Exhibits 1, 2, 3 and 4 of the Pretrial Order herein provides for the *possibility* of the plaintiff's *encountering* debris in the dredging operations *therein* contracted to be performed by the plaintiff, and that the said contract contains no *warranty* with respect to the *quantity* of forest trash, sinker logs, swifter wires, buried or submerged piling, bark, limbs, knots, and other foreign objects to be encountered by plaintiff.
>
> "IT IS FURTHER ORDERED ADJUDGED AND DECREED that all evidence of *statements*,

> *agreements*, *representations* made, or claimed to have been made prior to or contemporaneous with the date of said contract, which varies, adds to, modifies or is *contrary* to *the provisions of the said contract*, respecting debris, including evidence concerning quantity to be encountered, is inadmissible at the time of trial;" (Emphasis supplied) (TR. 134)

This order did not state that by the contract Palmberg ever agreed to *dredge* any materials other than sand, gravel and cobbles. The order simply stated that there was a reference in the contract to the *possibility* of plaintiff's "encountering" "debris" in its dredging operation. The order further stated that the written contract itself contained no *warranty* with respect to the quantity of certain types of trash and *obstacles* to be *encountered*. The order then limited proof by providing that evidence of oral statements which were contrary to the provisions of the contract respecting debris, might not be admitted. Simpson's brief refers to not one bit of evidence objected to by it dealing with any oral statements or other evidence attempted to be introduced contrary to the provisions of the contract. Contrary thereto, Simpson would have this Court believe that the Pretrial Judge's order meant that Palmberg was, for the price agreed upon, required not only to encounter, but also to *dredge* substantial "debris" *and* obstacles, and that Palmberg must encounter and overcome not only debris but many more of these obstacles in areas beyond and farther away and trashier than those from which it had originally agreed to dredge certain quantities!

Simpson's Assignment of Error No. 3

By this assignment Simpson in effect argues that it had no duty in asking for bids to disclose information known or available to it with reference to the work to be performed. This contract involved subterranean work in dredging materials beneath the water and beneath the surface of the ground covered by tidal waters. The evidence showed that Simpson had caused dredging to be done in adjacent areas a few years before (R. 123, 125). Although records of that work and the nature of the materials encountered were presumably readily available to it, it made no effort to review them and never produced them (R. 125, 126). One of Simpson's engineers who engaged in the contract discussions had worked on that previous dredging (R. 802). In this instance Simpson did disclose much partial information and its engineer testified that he did give all information available (R. 165). However, the jury was clearly entitled to believe that at the time the contract was entered into Simpson knew that there was not 350,000 cubic yards available in the primary area and that Simpson failed to disclose this information to Palmberg. Although Simpson's engineer stated that he had no anticipation of finding any sunken logs in the substitute area (R. 228), these logs were apparently Simpson's own logs. After they were salvaged by Palmberg, Simpson towed them away to its mill to saw into lumber (R. 555). Simpson was specifically advised that Palmberg's 12 inch dredge could not feasibly dredge an excessively

trashy area (R. 146, 164). Despite the fact that Simpson subsequently admitted that the buried piling was part of an old railroad trestle (Ex. 16), Simpson's engineer testified that he told Palmberg prior to formation of the contract that Simpson had no knowledge of any piling (R. 226). Simpson's engineer testified that on the basis of previous pile driving work and other construction in the area, the fill consisted of sand and gravel (R. 127-128). Simpson's investigation of the work had consumed several months (R. 126-131) while Palmberg had seen it on only two occasions, one of which was not at low tide. It is undisputed that Simpson did furnish and discuss much information as to the location and nature of the materials (R. 80, 84, 86, 102, 131, 147, 177, 165, 227). Specific inquiry as to nature of materials was made by Palmberg (R. 103-104).

It should be noted that this instruction contained no reference to debris, but was limited to location and nature of the materials and any substantial obstacles likely to be encountered. While argument is made that this instruction was inconsistent and confused the jury, no exception was made to it on that ground (R. Vol. VI, 64).

The situation is almost identical to that in the case of *Walla Walla Port District vs. Palmberg* (CA 9, 1960) 280 F. 2d 237 and the numerous cases cited therein, including *United States vs. Atlantic Dredging Co.* (1920) 253 U.S. 1, 40 S. Ct. 423, 64 L. Ed. 735; *Christie vs. United States,* (1915) 237 U.S. 234, 35 S. Ct. 565, 59 L.

Ed. 933; and *Hersey Gravel Coal vs. State* (Mich., 1943) 9 N. W. 2d 567, 173 ALR 302.

It would appear inconceivable that under any standards of fair dealing, Simpson, which had actual knowledge that the materials were not available in the areas in which they were represented to be available on the map given Palmberg, had a legal right to withhold this information. The jury was also clearly entitled to find that Simpson knew or should have known much more about the nature of the materials and the likelihood of substantial obstacles being encountered in the areas than was included in those disclosures which it elected to make. It is also significant that Simpson took no exception to the Court's Instruction No. 19 (R. Vol. VI, 29) which set out a similar rule of law and which, of course, became the law of this case.

Simpson's Assignments of Error Nos. 4 and 5

The only ground given for Simpson's alleged exceptions to these two instructions at trial was that they left "to the determination of the jury matters which have been previously covered in Judge Boldt's order granting a summary judgment." (R. Vol. VI, 64-66). No exception was made to Instruction No. 20 on any claimed ground that it erroneously stated the defendant's duty to disclose information and the effect of a breach thereof, nor was any exception made to Instruction No. 22 on any alleged ground that it improperly stated the law with reference to the nature of the materials to be *dredged*

(as distinguished from the Pretrial Judge's order indicating that the contract did contain a reference to the possibility of some debris being "encountered"). Neither instruction made mention of "debris". Neither instruction had any bearing on the parol evidence rule or any warranty contained or not contained in the written contract.

This distinction is apparent in the case of *Walla Walla Port District vs. Palmberg* (CA 9, 1960) 280 F. 2d, 237, supra, in which the written contract not only did not contain a warranty, but did contain a strong disclaimer of any warranty and an admonition to the contractor to make independent investigation as to conditions. Nevertheless, the Court at page 248 of that decision stated,

> "In our view the disclaimer provisions of the contract do not operate under the facts and circumstances of this case to prevent reliance by appellee on the implied representation of appellant that it had fully disclosed to appellee all relevant information and knowledge in its possession concerning sub-soil conditions." (Citing cases)

Those cases were the primary basis for the Court giving Instruction No. 20 which is almost identical with one of the instructions given and approved in the *Walla Walla* case. Instruction No. 22 dealt with the specific contractual obligation which Palmberg had assumed.

Simpson's exception at trial to both of these instructions was founded on its misconception that the Pretrial

Judge's order had the effect of changing this contract from one requiring Palmberg to dredge sand, gravel and cobbles, to one requiring it to *dredge*, encounter and surmount *substantial* debris *and* substantial amounts of obstructions other than debris, even in the extended areas from which it had never originally agreed to dredge the amounts of materials which proved to be required.

Simpson's Assignments of Error Nos. 6 and 7

By this assignment Simpson claims the Court erred in submitting to the jury the matter of some ambiguity in the contract. This is particularly incongruous, inasmuch as throughout this entire proceeding, it was clear that Simpson, rather than Palmberg, was the one attempting to claim that this contract was ambiguous. Palmberg consistently contended that under the contract it was required to dredge only sand, gravel and cobbles, that it was only required to furnish 1,500 feet of pipe line, and that the dredging was to be limited to the quantities and areas previously designated.

Simpson took no exception to the Court's Instruction No. 26 (R. Vol. VI, 34) by which the jury was advised that the parties were in disagreement as to the meaning of the contract and that it was for the jury to determine from the entire contract and from the circumstances the meaning. This became the law of the case. It took no exception to the Court's Instruction No. 11 (R. Vol. VI, 22) which advised the jury that one question involved was the reasonable interpretation of the con-

tract. It took no exception to the Court's Instruction No. 12 (R. Vol. VI, 23) which likewise submitted to the jury,

> "What was in the parties' minds at the time they entered into the written contract with respect to the work that was to be performed?"

This instruction specifically submitted the issue of ambiguity and the rules by which to construe a contract, and was an instruction submitted by Simpson itself. Many of the Court's other instructions to which no exception were taken likewise submitted to the jury the meaning of this particular contract.

Despite Palmberg's objections (R. 717, 718), Simpson's attorneys persisted in questioning both parties to the contract as to their respective understanding of its meaning (R. 400-401, 411).

Simpson in its brief (39) frankly admits that it is the law of the State of Washington that construction of a written contract may properly be submitted to the jury as a question of fact. *Keeter vs. John Griffiths, Inc.*, 40 Wn. 2d 128, 241 P. 2d 213 (1952).

Simpson's Assignment of Error No. 8

The instruction here complained of dealt with whether or not the evidence may have indicated an implied promise by Simpson to pay additional compensation. Simpson complains there was no such evidence. The jury was clearly entitled to believe that promptly

after the error in Simpson's original calculations and representations first became apparent to it, Palmberg by its letter (Ex. 25) clearly indicated that it was entitled to additional compensation. The jury was entitled to find that from that point forward Palmberg (obviously with Simpson's acquiescence) ceased billing at the contractual rate to await a final settlement. The jury was likewise entitled to believe that again, prior to the completion of its contract (Ex. 12), Palmberg again indicated that it expected additional compensation. The jury was entitled to believe that during this time Simpson asked for the figures on the additional costs necessarily incurred. This would clearly indicate to any reasonable contractor that Simpson intended to recognize its obligation. The jury was entitled to believe that in the absence of such apparent acquiescence, Palmberg would have asserted its clear right to cease performance and rescind. The case of *United States vs. Atlantic Dredging Co.*, 253 U.S. 1, 40 S. Ct. 423, 64 L. Ed. 735, held that a contractor is not required to quit work immediately upon discovering that the nature of the work is different than that represented, but may continue and still recover the value of his work.

The fact pattern is similar to that in the case of *Walla Walla Port District vs. Palmberg* (CA 9, 1960) 280 F. 2d 237. In that case the contractor likewise during the work notified the owner that conditions were proving different than as contemplated and requested suggestions as to the means of providing for an equitable ad-

justment and stated that in the meantime he would maintain a record of lost time and increased cost due to these conditions. There, as here, negotiations were subsequently undertaken but no agreement was reached. A similar situation was involved in the case of *Davis vs. Commissioners of Sewerage of City of Louisville* (Ky. 1936) 13 F. Supp. 672, in which upon discovering that conditions were different than as represented, the contractor indicated to the owner that it would expect additional compensation, but made no specific threat to quit or rescind. The owner did not reject this claim until after the work was completed and the Court allowed recovery for the increased costs upon a quantum meruit basis. The Court noted that the claim of changed conditions having been made and not rejected, the work had apparently proceeded on a basis different than the contract with the consent or permission of the owner.

Under the contention of the plaintiff and the evidence this instruction was clearly justified.

Simpson's Assignment of Error No. 9

This assignment points up a basic deficiency in the manner in which Simpson attempted to object and except to the Court's instructions. Neither in its Assignment of Error nor in its argument on this assignment does Simpson point out any reference to the page of the record at which it supposedly made any valid objection or exception to this instruction. At trial, in attempting to take its exceptions (R. Vol. VI, 62-67), Simpson's

attorneys did not refer the Court to the instructions actually given by the Court, but only referred by number to somewhat similar instructions which had been proposed by Palmberg. In practically no instance was the proposed instruction referred to identical to the actual instruction given by the Court. This assignment is directed to the Court's Instruction No. 28. By appendix Simpson states that this is the same instruction as Palmberg's proposed Instruction No. 20. The record on this appeal contains no such proposed instruction, or even any similar proposed instruction of Palmberg. This exception is clearly deficient.

The only possible exception which might be related to the Court's Instruction No. 28 is that there was no evidence to support it. Despite extensive pretrial, Simpson refused to admit, until they were forced to admit during the actual trial (R. 153), that its error in the information which it originally furnished Palmberg was the result of "mistake". Simpson's engineer, who had also negotiated the contract, admitted at trial that he had no knowledge of the existence of the submerged piling (R. 226) or of the buried logs (R. 228), and obviously Palmberg had no knowledge of their extent.

It is difficult to understand how the writer of Simpson's brief could have in good faith stated to this Court (Simpson's brief, 42, 43) that,

> "There was no evidence presented in the trial of the case which would support an instruction on mistake."

Under the evidence this instruction was fully justified.

Simpson's Assignment of Error No. 10

In this assignment Simpson claims (Brief 43) that: "The Court erred in admitting *any* evidence regarding debris *encountered* by the appellee in its dredging operations."

Heretofore in this brief Palmberg has analyzed the Pretrial Judge's order which held only that there was reference in the contract to the possibility of "encountering" some debris, and held that the written contract did no contain any warranty with respect to the amount, either of debris or other foreign materials or obstacles which might be encountered. Again in this assignment Simpson's attorneys misconstrue that order which only precluded evidence of *representations* as to the amount of "debris" which was contrary to the terms of the written contract. Webster's International Dictionary defines "debris" as "rubbish". The testimony clearly distinguished debris from other foreign materials and objects actually encountered and in some instances actually dredged, which included large concrete blocks, driven imbedded piling, salvagable sinker logs up to 40 feet in length, boom chains, and even tires and tricycles. The distinction between debris and other foreign materials and obstacles was brought out by the testimony (R. 364).

As previously indicated herein, Palmberg is convinced that the order of the Pretrial Judge was in error because it attempted to construe the contract without the bene-

fit of the surrounding circumstances. Nevertheless, at trial, Palmberg studiously abided by that pretrial order. No attempt was made to introduce evidence of additional cost by reason of encountering debris in dredging those quantities from the areas in which Simpson had originally represented those respective quantities were to be dredged. Evidence of damages by reason of debris and even of other foreign objects and obstacles was studiously limited to those areas (all of which were farther away than the primary area) (R. 368) from which Palmberg was required to dredge more materials than it had originally agreed. In this assignment (Simpsons brief, pg. 18), Simpson complains of ten instances. *NOT ONE* of these references deal with any evidence as to any "warranty", or to any " statements, agreements, represenations made or claimed to have been made" with reference to debris. In practically every instance they involve obstacles other than debris and in practically every instance deal with the farther areas from which Palmberg had to dredge the additional materials which were originally represented to be present in the closer and cleaner primary dredge area.

In this argument Simpson isolates a portion of one statement by counsel and then states that it constituted "an intentional misrepresentation to the Court". Understandably we take offense at this statement. Simpson has quoted only a portion of counsel's statement taken out of context. A full reading of the colloquy commencing at page 30 of the record clearly belies counsel's state-

ment. Should there be any doubt in the mind of this Appellate Court as to the impropriety of that accusation, counsel calls this Court's attention to additional statements by counsel in the record at the following pages: R. 34, R. 42, R. 52-53, R. 59, R. 565.

All such evidence as the Trial Court did admit was clearly admissible under the issues and under a proper construction of the Pretrial Judge's order, which order dealt only with the parol evidence rule.

From the evidence the jury was entitled to believe that Palmberg was required to obtain some 128,000 cubic yards of materials from areas all beyond the area where those materials had been represented to be available. It was entitled to find that one of these areas, the ferry channel, was much trashier than the primary area (R. 227, 368). It was entitled to find that one of those areas, the log slip area, was much more trashy (R. 369). It was entitled to find that one of those farther areas, the extended area, was much more replete with imbedded piling (R. 542, 554). It was entitled to find that one of those areas, the substitute area, contained many more of Simpson's sunken logs imbedded and buried beneath the surface (R. 554). All of this evidence was admissable, relevant and material to the agreed issues.

Simpson's Assignment of Error No. 11

By this assignment Simpson complains of the Court permitting the introduction into evidence of the plat (Ex. 2) which it admittedly prepared and furnished

Palmberg as a basis for Palmberg's proposal. Simpson claims that the admission of this map violated the parol evidence rule and "contradicts" the written contract. This appears to be Simpson's primary assignment of error.

The evidence showed that Simpson, commencing in August of 1959 (R. 128), with its engineering staff took soundings and elevations of the area (R. 128), which work continued through November (R. 130). The purpose of this investigatory engineering work was to determine both the volume of the fill and the area in the bay from which the materials could be obtained (R. 30). Simpson wanted this information, "in order to give the contractor to show him what the job consisted of" (R. 131). The purpose of making these surveys was "to give the contractor a picture of the job that he was bidding on" (R. 131). This information was put on the plat (Ex. 2, R. 131). This map was furnished Palmberg prior to formation of the contract (R. 135). Simpson's witness could not recall giving Palmberg any other map (R. 136). The map showed, "the area where the dredged material can come from" (R. 137). At the time this map was furnished Palmberg, Simpson had completed the taking of all of its soundings (R. 152). The jury was entitled to believe that the map was given Palmberg "to show us the proposed work to be done, and where the materials and quantities of materials were to come from for doing the work" (R. 84). The jury was entitled to determine that no other plat or drawing was given the

bidder (R. 136). The jury was entitled to believe that Palmberg based its proposal on that map (R. 453-454) and relied on the information contained on it (R. 455).

Thereupon Palmberg submitted by letter its proposal (Ex. A-1) which stated in part,

> ". . . re *your proposed* dredging of sand, gravel and cobbles to maximum size of 8" at your Shelton, Washington plant, we offer to perform dredging in *areas designated by you* . . ."

This proposal contained no other designation of the amount of material to be dredged, no other description of the nature or location of the materials to be dredged, no designation of the depth to which the dredging was to be done, no designation of the location or size of the fill or of the height to which the materials were to be dredged. All of this information had been contained on the map, plat or diagram (Ex. 2) which Simpson had prepared from its engineering data and previously given Palmberg.

Nevertheless Simpson now claims that this proposal was full and complete on its face as to all of the details of the work. To sustain this argument, it contends that Palmberg's proposal should be construed to mean that Palmberg was offering at a firm rate, to dredge from *any* areas, no matter how far away, nor what type of materials or conditions might prevail, to *any* areas which might be *subsequently* designated by Simpson. Simpson's own resident engineer who negotiated the contract,

testified that this was not his understanding of the meaning of Palmberg's proposal (R. 790). Simpson attempts to justify its argument that this was the meaning of Palmberg's proposal by reference to paragraph 8 of that proposal. Subparagraph 5a of the proposal provided that payment should be dependent on the cubic yards dredged as computed by surveys made before and after dredging. The contract provided that payment was to be made on the basis of the amounts deposited in the fill, rather than the amounts dredged out of the cut. To assure itself that Simpson's surveys of the fill would be accurate, paragraph 8 of Palmberg's proposal read as follows:

> "Measurement of quantities dredged shall be made at your expense by measurement *of the areas filled.* Platts or cross sections of surveys shall be given to us for checking before dredging commences and within thirty days after the completion of dredging operations."

Simpson now claims that the purpose of this requirement was *not* so that Palmberg might check the accuracy of Simpson's surveys evidencing the amount of materials which it put into the fill. Simpson now claims that the purpose of this paragragh was to "incorporate by reference" its *subsequently* prepared cross sections of the areas to be *dredged.*

Simpson also neglects to advise this Court that it *agreed* to the admission of a copy of this plat in the pretrial order (TR. 198), and made no objection to its ad-

mission into evidence when this was urged as a further ground for its admission (R. 132-134).

Paragraph 8 of Palmberg's proposal was obviously inserted in order to afford him an opportunity to check Simpson's measurement of the fill. It is similar to a provision in a logging contract which would require that scale sheets be submitted or a provision in a mining contract that proper evidence of the ore mined be given the other party.

The doctrine of incorporation by reference upon which Simpson relies is limited by the rule that when reference to another writing is made for a particular and specified purpose, such other writing becomes a part of the contract *only* for such specified purpose and to the extent of the reference. 17A C.J.S. Contracts, §299, 137; 13 Am. Jur. 2d, Building and Construction Contracts, §12, 16; *Guerini Stone Co. vs. P. J. Carlin Construction Co.*, 240 U.S. 264, 36 S. Ct. 300, 60 L. Ed. 636, 642. Those authorities state that the document referred to can serve no other purpose than the one specified and is foreign to the contract for all other purposes. Obviously in this instance the only purpose in referring to the before and after surveys of the fill was so that Palmberg might check their accuracy to determine its proper pay quantities and this provision could not conceivably have incorporated any such cross section subsequently furnished as intended to change the amounts and locations of the materials to be *dredged*.

In this case Simpson's plan, (Ex. 2) was clearly admissible. In *Maryland Casualty Co. vs. Seattle* (1941) 9 Wn. 2d 666, 116 P. 2d 280, the Court recognized and approved this basic principal of law, citing from an annotation in 76 ALR 268, 269,

> "The general rule may be deduced from the decisions that where plans or specifications lead a public contractor reasonably to believe that conditions indicated therein exist, and may be relied upon in making his bid, he will be entitled to compensation for extra work or expense made necessary by conditions being other than as so represented."

Similar principles are set out in the case of *Montrose Contracting Co. vs. County of Westchester* (CA 2, 1936) 80 F. 2d 841 at pg. 842:

> "Where one party furnishes specifications and plans for a contractor to follow in a construction job, he thereby impliedly warrants their sufficiency for the purpose in view. *United States v. Spearin*, 248 U.S. 132, 39 S. Ct. 59, 63 L. Ed. 166; *Penn Bridge Co. v. City of New Orleans*, 222 F. 737 (C.C.A. 5); *MacKnight Flintic Stone Co. v. Mayor of New York*, 160 N.Y. 72, 54 N.E. 661. The specifications outlined above would be adequate only where the tunnel was to be built in free air. Thus the appellee, setting out these specifications to be followed, impliedly warranted the tunnel was substantially a free air job. Whether the builder was damaged in proceeding with the work in reliance on this implied warranty, as in the cases supra, or whether he was damaged in relying on the warranty in making his bid, as he did here, he may recover. *Christie v. United States*, 237 U.S. 234, 35 S. Ct. 565, 59 L. Ed. 933; *Hollerbach vs. United States*, 233 U.S. 165, 34 S. Ct. 553, 58 L. Ed. 898."

In the case of *Meachem vs. Dioguardi* (1932), 166 Wash. 684, 8 P. 2d 293, the prime contractor had contracted with the United States to do work on buildings in accordance with plans and specifications prepared by the United States. Thereafter the contractor, by written contract, sublet "all electric work according to the plans and specifications" to a subcontractor. The evidence showed that the subcontractor submitted its bid based upon a copy of those plans and specifications given it by the contractor. However, the plans given it by the contractor did not include one sheet which would have required some additional wiring. The contractor contended that the Trial Court erred in admitting in evidence those plans and the oral testimony of the subcontractor that it submitted its bid and contracted with reference thereto. The Court disagreed and held that those plans and oral testimony were clearly admissible. It held that the subcontractor had a duty to perform the work in accordance with *the* plans given it "for the purpose of submitting a bid". Said the Court at page 687:

> "Stripped of all unnecessary verbiage, we here have a situation of a general contractor furnishing an incomplete or defective set of specifications to a subcontractor upon which to submit a bid or estimate. This is not a case where the subcontractor seeks to escape the effect of his contract by claiming that he never saw or examined the specifications. Manifestly, it would be inequitable and unjust to hold that a subcontractor cannot rely upon specifications given to him for the express purpose of submitting a bid. The rights of the parties are to be measured and determined by the particular set of specifica-

> tions (exhibit "B") upon which the respondents submitted their bid."

The admission of this plan clearly did not violate the parol evidence rule because it was in no way inconsistent with Palmberg's proposal. On the contrary, it was entirely consistent with that proposal. Likewise, this plan did not in any way contradict that proposal. On the contrary, Simpson is claiming that *it* was entitled to contradict the contract and change the obligation of Palmberg because it subsequently furnished cross sections of *some* of the areas to be dredged, which might have, if properly analyzed, indicated the work was different than that which Palmberg had originally agreed to perform.

Simpson Assignments of Error Nos. 12, 13, 14 and 15

Simpson here complains that the Court should have granted its various motions to dismiss and direct verdict in its favor. It is the law of the State of Washington that upon making motions of the type referred to in this assignment the defendant,

> ". . . admits the truth of plaintiff's evidence and all inferences favorable to them arising therefrom, and in ruling upon the motion, if the evidence allows more than one reasonable interpretation, the court must interpret the evidence most strongly against the moving party and most favorably to the opposing party. The court cannot grant the motion unless there appears to be no substantial evidence to support the claim."

Merrick v. Sears, Roebuck & Company (1965) 67 Wash. Dec. 2d, 419.

As this Court stated in *Walla Walla Port District vs. Palmberg*, (CA 9, 1960) 280 F. 2d 237, 246,

> "It is to be remembered that the appellee was the prevailing party before the District Court; that all issues of fact were resolved by the jury adversely to the appellant; and that appellee is entitled to the benefit of all favorable inferences from the facts proved relative to the issue of liability."

In its argument on these assignments Simpson attempts to reverse this rule entirely, and in effect asked the Trial Court and now asks this Court to disregard all of plaintiff's evidence and to assume the truth of defendant's evidence and all inferences favorable to the defendant, and to interpret the evidence in favor of Simpson, rather than against it. Simpson's arguments on these assignments, as are practically all its arguments on this appeal, are factual rather than legal. Simpson was permitted to submit and argue fully all of these points to the jury which rejected them.

At page 56 of its brief, Simpson's attorneys state that the "apparent" grounds of Palmberg's claim were as stated by them. They then attempt by reference to evidence *most* favorable to their position to resolve those issues. The grounds upon which Palmberg relied were not those outlined in Simpson's brief. By way of comparison, Palmberg here summarizes its actual grounds:

(1) Damages and extra costs incurred because there proved to be substantially less than the 350,000 yards which Simpson had represented to be available in the

primary area. Additional materials had to be obtained, not only from the area east of the primary area (which was proved to be trashier and to contain many more buried piling than the area originally designated), but also from the ferry channel (which proved substantially trashier) and some from the substitute area (which was replete with many more sinker logs). All had to be pumped longer distances and the adverse conditions encountered in each of these farther areas compounded the problem and greatly increased the costs.

(2) Palmberg claimed no damages because of encountering debris other than those damages which resulted from being required to dredge and pump excessive debris from longer distances in areas more trashy than those originally agreed, damages for the value of extra work in encountering and cutting out buried piling in the extended area (which it never originally agreed to dredge) and in coping with the extra amount of obstacles, such as concrete blocks and Simpson's sinker logs in the substitute area, as to that portion thereof in which Palmberg was required to dredge extra materials.

(3) Compensation for *all* rather than only a part of the materials placed in the fill. The unrebutted evidence showed that there had obviously been placed in the fill substantially more than the yardage for which Simpson offered to pay. The evidence also conclusively showed that Simpson blatantly breached its contractual obli-

gation to furnish Palmberg cross sections of surveys of the completed fill.

(4) At trial Palmberg did not seek damages directly resulting from changes in the work. Palmberg's theory was that it voluntarily acquiesced in those changes at a time when it was still assuming that materials were available in the areas as originally represented. Its theory was that it would not have acquiesced in those changes had it then known that it was going to be required to dredge additional materials from areas more distant, more trashy and more obstructed, because the changes to which it originally agreed subsequently required it to dredge the additional materials even longer distances.

(5) This is the only of Palmberg's contentions which Simpson in its brief fairly states. Palmberg did suffer damage because it was required to pump the additional materials for distances greater than those contemplated by the contract.

By the first subsection of its argument on these assignments, Simpson argues that Palmberg was not damaged even though it had to obtain approximately 128,000 cubic yards of materials from trashier and more obstructed areas, all farther away from the fill than the primary area. Palmberg never denied that had there been 350,000 yards available in the primary area, it would still have been required to pump another 100,000 yards from some of the other areas. However, its

claim for damages was because it was required to pump more than twice that extra amount from the farther and trashier areas and in some instances from areas which it never originally agreed to dredge. The 1,500 feet of pipe line which Palmberg agreed to provide was to be a maximum. The evidence showed that in some instances, because of Simpson's original error, it had to provide up to 2,700 feet of pipe line. The outer boundary of the primary area in which there was supposed to be 350,000 yards was only 600 feet away from the fill. That area could obviously have been dredged with average pipe line distance of 600 feet. Simpson argues that Palmberg was not damaged because it was able to obtain some of that additional yardage by pumping somewhat over twice that far.

In the second subsection of this argument (brief 65) Simpson argues that the changes which Simpson directed in the method and manner of the work during its prelminary stage, did not increase Palmberg's costs because Palmberg at that time agreed to them. There was never any dispute that Palmberg agreed to those changes and it never sought any specific recovery by reason thereof. As previously indicated, its theory was that it would not have agreed to those changes had it known that it subsequently was going to have to go farther away to get the needed materials, but that those changes did compound its damages when it later became necessary to get the needed materials from farther away.

In its next subsection (brief 66), by adopting that portion of the evidence *most* favorable to it Simpson argues that the yardages dredged into its fill must have exactly corresponded with its predredging surveys, even though the evidence showed that its predredging surveys were based on a one to one slope while the completed slope obviously contained many thousands more yards of material (R. 584-588, 806, 815, 940-941). This factual argument was also made to the jury which had a right, on the basis of other testimony to disregard it. To illustrate the invalidity of this argument to an appellate court, Palmberg has inserted as its Appendix No. 1 to this brief a comparison of the quantities which Simpson here claims were dredged from each of the respective areas, with the amounts which the jury was entitled to believe were actually dredged from each of those respective areas. This collation also shows a comparison in those same areas of the amount of material which Simpson from its surveys and cross sections originally computed to be available in each, the amounts which Simpson represented on its map to be available in each, and a notation as to whether or not Simpson ever furnished any cross sections to Palmberg of each of these areas. That comparison clearly shows that the cross sections of those of the dredge areas which Simpson gratuitously furnished did *not* designate the areas to be dredged and the amounts of materials available in each area as specifically represented by Simpson at page 59 of its brief. Those cross sections did cover *some* of the areas to be dredged, but also included other areas

which were *not* dredged and were *not intended* to be dredged and excluded substantial areas which *were* to be dredged. It seems inconceivable that Simpson under this state of the facts would argue that those cross sections did or were intended to designate the areas to be dredged. If this were so, Simpson's error and misrepresentations would be even grosser than those contained on the map which Simpson furnished Palmberg upon which to base its bid!

The next subsection deals with alleged damages resulting from encountering debris. As previously shown, at trial Palmberg did not seek any damages for debris in dredging the quantities in the amounts originally designated in the respective areas.

In the final section of its argument on these assignments, Simpson again argues that the jury should have adopted its argument that the increased pumping distances of up to 2,700 feet were not its fault, despite the fact that the jury was clearly entitled to believe otherwise. It also again propounds the obviously invalid argument that the doubling or tripling of the required pumping distances for much of the materials over the supposed distances upon which Palmberg bid, did not damage Palmberg because it had agreed to furnish a maximum of 1,500 feet of pipe line for the work to be performed. Palmberg's expert testimony was directly to the contrary, but it would not require any expert testimony to understand the apparent invalidity of such an argument.

Obviously, the exact extent of Palmberg's damage could not be proved with mathematical certainty. In pumping under pressure unseen materials from underneath the ground and water from varying depths and under varying conditions for varying lengths and to varying heights, it is obviously difficult to ascribe any dollar amount of increased costs to any one of these varying factors. However, no error is assigned to the competency of any of Palmberg's experts, nor to the nature of the questions or answers given by them. Each of these experts were of the opinion that Palmberg's damages greatly exceeded the amount which the jury allowed and the jury was fully entitled to believe or adopt all or any portion of their testimony. As pointed out in the case of *Walla Walla Port District vs. Palmberg* (CA 9, 1960) 280 F. 2d 237, 249, and the Washington cases cited therein, in a case such as this damages need not be proved with mathematical certainty. In this case there was no uncertainty whatsoever as to the existence of the damages nor of their causation.

Simpson's Assignment of Error No. 16

By this assignment Simpson is claiming that the jury verdict against it on the supposed issue of its damages for delay in completion of the contract was erroneous. The issue was fully and fairly submitted to the jury. No assignment is made as to the admission or rejection of any evidence, to the Court's instructions, or to its rulings.

By Palmberg's argument on its Assignment of Error No. 3, it has been shown that Palmberg surely did not by the written contract agree to complete the work by any specific date and that issue should not even have been submitted to the jury. Evidence of discussion of a supposed completion date was admitted over Palmberg's objection that it violated the parol evidence rule, even though *Simpson* claimed and is claiming that the parol evidence rule is applicable to this contract (R. 707, 757. See also Colloquy, R. 742-746). The original proposal did make specific provision for rate of progress, providing that dredging should be carried on 24 hours per day, five or six days per week. There was never any contention that this provision was not fully complied with. Indeed the evidence showed that normally the dredges worked six rather than five days a week and work was even done on Sundays to attempt to keep the dredges in repair.

In any event, the jury was clearly entitled to believe that Simpson waived any supposed requirement as to a definite completion date when Ashford gave permission for removal of the second dredge from the job prior to June 1 (R. 777). At Simpson's request the Court submitted the issue of whether there was any *implied* obligation to complete the work within a reasonable time (Instruction No. 13, R. Vol. VI, 24a), and also at Simpson's request gave its Instruction No. 17 (R. Vol. VI, 28) as to an *implied* condition that the contractor was obligated to furnish proper equipment, even though Simp-

son argues that Palmberg did not have the right to rely on any implied conditions or warranties. By its Instruction No. 34 (R. Vol. VI, 39), also proposed by Simpson, the Court instructed the jury at great length on this supposed implied condition of a reasonable completion time.

Under the evidence the jury was entitled to find that the time within which the contract was completed was entirely reasonable under the extremely adverse circumstances encountered. The testimony of Ashford, Simpson's engineer, indicated that under the conditions originally outlined, Palmberg expected production of between 150 and 200 yards an hour (R. 759). Under the conditions actually encountered, production averaged only about 65 yards per hour (R. 375). The sliding pay scale in the contract itself indicated that the parties believed Palmberg's compensation would range from $48.00 an operating hour down to $40.00 an operating hour. For a little redredging which Palmberg agreed to do at the end of the contract on a straight rental, the parties agreed on the rate of $40.00 per operating hour (R. 383). As the work proved out, under Simpson's computation Palmberg would have received only $25.60 per hour (R. 393), within which would have been included the $16,187.00 balance which Simpson wrongfully withheld. This does not even take into account, nor would it have included any compensation to Palmberg whatsoever for the expensive down time and breakage and replacement of equipment. Obviously, under these

conditions the jury was entitled to find that the work was completed well within a reasonable time.

In addition, the jury was entitled to disregard Simpson's extremely tenuous testimony of any supposed damages. This assignment is without foundation.

CONCLUSION

Simpson, although always admitting that Palmberg had dredged at least 460, 947 cubic yards and was clearly entitled to at least the sum of $16,187.00, wrongfully refused to pay that additional amount unless Palmberg would forego its claim for additional compensation to which the jury found it was entitled. On its own pleading Simpson admitted that Palmberg was entitled to at least that additional sum and alleged that it had refused to pay it only on the basis of supposed counter claims which on trial proved groundless. For over four years Simpson has had the use of that sum and Palmberg has been wrongfully deprived of its use. Under the facts and law, Palmberg is entitled to interest on that amount.

With reference to Simpson's appeal, its argument is based entirely on its construction of the facts and evidence. The jury, properly instructed, has determined the factual issues. Simpson had every benefit, both of the law and the extremely favorable and probably erroneous ruling of the Pretrial Judge. It has absolutely no grounds of complaint with reference to the small amount

of the verdict which the jury awarded. Even though the work proved entirely different and more expensive than as represented by Simpson or contemplated by either party, the net award for additional compensation, exclusive of sales tax, was only $17,616.84.

The judgment should be increased by the amount of the interest to which the plaintiff was obviously entitled, and in other respects, affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

JAMES E. O'HERN
Of counsel for Palmberg

	As per Information Furnished other Bidders (R. 231) from Simpson's Ex. 8	As per Information Furnished Palmberg by map (Ex 2)	As per Representation On P. 66 of Simpson Brief	As per Actual Testimony	
Primary	222,370	350,000	222,370	Unknown (R. 523) but probably at least 222,000 (R. 520)	Yes
Car ferry	8,370 (to minus 1.0)	25,000 (to minus 1.0)	35,000	35,000 to 40,000 (pretrial, TR. 139) but dredged much deeper than -1.0) (R. 368)	Yes
Substitute	155,000	Area not shown but Palmberg shown aerial; told 75,000 (R. 105)	80,000	Unknown (R. 516, R. 521, R. 522, R. 523)	No! (R. 526, R. 521-522)
Log pond (slip)	24,810	None	15,000	Unknown (R. 521) but probably maximum of 15,000 (R. 521)	No! (R. 526)
Log dump	None	75,000 (but agreed prior to contract Palmberg not to dredge because too trashy) (R. 105-110)	None	None	Yes! (R. 526)
Extended (East of primary)	31,000	None	107,000	Unknown (R. 513, 522-523)	Yes (Indicating 31,000)